



Law

CONTRACT DISPUTES AND BID PROTESTS

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This instruction establishes policy and procedures for litigating contract disputes and bid protests. This instruction is applicable to all military and civilian personnel assigned or attached to the United States Transportation Command (USTRANSCOM) at Scott AFB IL. Send comments and suggested improvements to this publication on Air Force Form 847, *Recommendation for Change of Publication*, to the Office of Staff Judge Advocate (TCJA). Ensure that all records created as a result of processes prescribed in this publication are maintained in accordance with USTRANSCOM Instruction 33-32, *USTRANSCOM Records Management Program*.

1. References and Supporting Information. Applicable statutes, regulations, and acronyms are listed at Attachment 1.

2. Authorities. Nothing in this instruction is intended to conflict with the Head of the Contracting Activity (HCA) or Contracting Officer Authority as delegated or authorized in the Federal Acquisition Regulation (FAR). If there is a conflict between this instruction and the FAR, the FAR takes precedence.

2.1. Contracting Officer. The contracting officer's authority to decide or settle all claims relating to a FAR contract is contained in FAR 33.210, *Contracting Officer's Authority*. A contracting officer's decision is final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or suit is timely commenced. Title 41 United States Code (USC) § 605(b). Further, in FAR 33.210, contracting officers are authorized to use alternative dispute resolution (ADR) procedures under FAR 33.214 to resolve contract claims.

2.2. USTRANSCOM Commander and/or Program Managers. While contracting officers have final authority in contract matters, USTRANSCOM Commanders and/or program managers may have the authority/responsibility to approve and/or review funding for contract actions, provide funding and/or support for litigation, review disputed contract actions for technical and operational issues, and participate in ADR or other dispute proceedings.

2.3. Armed Services Board of Contract Appeals (ASBCA).

2.3.1. Contract disputes. The Contract Disputes Act of 1978, as amended, 41 USC § 601-613, *Contract Disputes*, provides that a contractor may appeal a contracting officer's final decision to the appropriate board of contract appeals or to the United States Court of Federal Claims. A contractor has 90 days from receipt of a contracting officer's final decision to file an appeal with the appropriate Board of Contract Appeals. 41 USC § 606, *Contractor's Right of Appeal to Board of Contract Appeals*. The ASBCA has been designated by the Secretaries of Defense, Air Force, Army, and Navy as the appropriate board for contract disputes arising under Department of Defense contracts. The charter and rules of the ASBCA are found in the Defense Federal Acquisition Regulation Supplement (DFARS), Appendix A.

2.3.2. Correspondence. TCJA will review and forward, through the Air Force Legal Operations Agency (AFLOA), all correspondence to the ASBCA.

2.3.3. USTRANSCOM contracting officers should immediately notify TCJA of any appeal or notice of appeal concerning a contract claim at the ASBCA.

2.3.4. AFLOA. Pursuant to the memorandum from the General Counsel of the Department of Defense to the USTRANSCOM Commander, dated 3 July 2008, and letter from AFLOA Chief Trial Attorney to the ASBCA dated 25 February 2009, AFLOA, as the Executive Agent for USTRANSCOM, is responsible for providing specialized legal support to USTRANSCOM in accordance with DOD Directive 5100.3, *Support of the Headquarters of the Combatant and Subordinate Unified Commands*. In that role, AFLOA is responsible for representing USTRANSCOM in all appeals before the ASBCA.

2.4. Federal Courts.

2.4.1. Under the Contract Disputes Act, a contractor may, in lieu of appealing a contracting officer's final decision to a ASBCA, bring an action directly on a claim in the US Court of Federal Claims within one year of receipt of the contracting officer's final decision. 41 USC § 609(a)(3), *Judicial Review of Board Decisions*. The Department of Justice is responsible for the litigation of such cases and will be assisted by a USTRANSCOM and/or AFLOA attorney.

2.4.2. US Court of Appeals for the Federal Circuit. Either the contractor or Government may appeal a decision of a Board of Contract Appeals to the US Court of Appeals for the Federal Circuit within 120 days. 41 USC § 607(g)(1)(A), *Agency Board of Contract Appeals*. A decision of the US Court of Federal Claims may be appealed within 60 days after the date of entry of judgment. FED. R. APP. P. 4(a)(1), *Federal Rules of Appellate Procedure* (Appeal Period). In an appeal from a Board decision, the decision of the Board on any question of law is not final or conclusive, but the US Court of Appeals for the Federal Circuit will not set aside conclusions on questions of fact unless the decision is fraudulent, arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence. 41 USC § 609(b).

2.4.3. Correspondence with the Department of Justice (DOJ). TCJA shall coordinate, draft and transmit to DOJ the litigation report on contract claims and appeals.

3. Responsibilities.

3.1. Funding litigation. Contract litigation may require temporary duty travel to conduct depositions, hearings, and/or ADR proceedings. Contract litigation may involve costs to conduct discovery, reproduce documents, or contract for additional litigation support. Contract litigation may also require witness production which often involves funding invitational travel orders. These and other litigation expenses generally will be paid by the program, directorate, or requiring activity.

3.2. Document preservation and production. Contract litigation generally involves significant document preservation and production that extends beyond requirements set forth by general retention policies. Contracting officers, program managers, and staff, as well as other USTRANSCOM personnel have a legal duty and obligation to preserve documents relevant to the disputed contract. Willfully disregarding these procedures and destroying evidence, including erasing or deleting electronic data, could negatively impact the ability of USTRANSCOM to prevail in the underlying litigation and could be a violation of federal criminal statute. The following paragraphs generally outline document retention and production in contract disputes.

3.2.1. Scope of requirement. Document retention and production in contract disputes is generally governed by the Federal Rules of Civil Procedure (FRCP). The FRCP govern the identification and production of materials in each party's possession, and permits parties to inspect and/or copy, any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations relevant to the dispute. This includes the right of the requesting party to request entry onto USTRANSCOM premises, or other property possessed or controlled by USTRANSCOM, so that the requesting party may access the material detailed above. Courts may also order US Government contractors to comply with these requests.

3.2.2. Producing documents or electronically-stored information (ESI). The FRCP requires parties to produce documents as they are kept in the usual course of business (also known as "native file formats"). As ordered by a court, board, or by agreement between the parties, USTRANSCOM will be required to organize and label documents to correspond to the specified categories in the order/request. Law and judicial precedent have generally established that agencies have a duty to produce all data stored on agency networks (i.e., email, electronic files on servers, system area network servers, workstations, portable media, laptops, etc.) and documents not in digital formats. Because most contract information is now submitted, recorded, and retained in electronic format, USTRANSCOM will generally be required to produce all of the data that is ordered/requested. Document production may be facilitated by the individual(s) designated by USTRANSCOM as having the responsibility to execute the appropriate searches across the ESI within USTRANSCOM (hereinafter "ESI Search Technician").

3.3. Contact with contractor counsel. Often, contractors who are parties to contract litigation are represented by counsel. USTRANSCOM personnel, acting in their official capacity, receive legal advice from USTRANSCOM attorneys. If USTRANSCOM personnel are contacted by

other than Government counsel, they should refer that counsel to a USTRANSCOM attorney and should not answer questions posed by non-Government counsel, unless it is first discussed with TCJA. Generally, all communication with non-Government counsel should be conducted by TCJA attorneys.

4. Claims. This subpart sets forth procedures for considering and processing contract requests and claims.

4.1. Background. The Contract Disputes Act establishes procedures and requirements for asserting and resolving contract claims subject to the Act. The Act provides for a final written decision of the contracting officer when the claim cannot be resolved by agreement of the contracting parties. The contractor may appeal a contracting officer's final decision to the appropriate Board of Contract Appeals within 90 days of receiving the decision. Alternatively, the contractor may also bring an action directly in the US Court of Federal Claims within 12 months of the contracting officer's final decision. These time limitations are jurisdictional and there is no authority for an extension of these time limitations. A contracting officer may change, modify, or recall the decision within the appeal period. If the decision is changed or modified, a new appeal period begins. Policies and procedures for processing contract claims, as well as the definition of key terms, are set forth in FAR 33.2, *Disputes and Appeals*.

4.2. Policy. As set forth in FAR 33.204, *Policy*, the Government's policy is to attempt to resolve all contractual issues in controversy at the contracting officer level. Reasonable efforts should be made to resolve controversies prior to submission of a claim. USTRANSCOM personnel are encouraged to use ADR procedures to the maximum extent practicable.

4.3. Claim processing procedures. Any written request by a contractor for the payment of money, granting of time adjustment, or interpretation of contract terms or other relief arising under, or relating to, the contract, even if the amount of money or time requested is unstated, may become a contract claim against the Government. If not included in the original request, the contractor should immediately be asked to furnish documentation, e.g., facts, cost breakdown, or the contract clause underlying the claim. Some requests can be resolved in a relatively short period of time. Every effort should be made to resolve such requests as soon as possible.

4.3.1. Certification Requirements. A contractor is required to certify all claims exceeding \$100,000. The certification should read as stated in the following paragraph.

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

4.3.2. Initial Investigation of a Claim. A contract claim for which all certification requirements have been met shall be subject to a thorough fact finding investigation conducted by appropriate staff members, including a USTRANSCOM attorney. During this investigation, TCJA will determine the scope of the review and evaluate the relevancy and materiality of the facts

considered. TCJA may also request other USTRANSCOM personnel provide written statements and affidavits. TCJA may engage the ESI Search Technician to place forensic copies of all electronic files deemed relevant to the matter in safe storage until the matter is resolved. USTRANSCOM Acquisitions (TCAQ) and other USTRANSCOM directorates will also take appropriate measures to preserve relevant documents, data, and contract material pursuant to paragraph 3.2. of this instruction. After the investigation has been completed and the staff recommendations have been considered, the contracting officer and a TCJA attorney should offer the contractor (and its attorney, if represented by counsel) an opportunity to attend a conference to discuss the claim. An attorney from TCJA should participate in this conference. If the contract claim has merit in whole or part, an attempt should be made to negotiate quantum, either at the conference or at a later time agreed to by the parties.

4.3.3. ADR. Contracting officers and TCJA attorneys are strongly encouraged to consider the use of ADR techniques in all claims at the earliest possible time. These ADR techniques include, but are not limited to, attorney-assisted negotiations, nonbinding arbitration, mediation, and mini-trial.

4.3.4. Unresolved claims. When a claim by or against a contractor cannot be settled, or the contractor makes a written request for a final decision, the contracting officer shall issue a written decision on the claim. For claims under \$100,000, the decision will be issued within 60 days of the receipt of the written request from the contractor for a decision. For claims over \$100,000, the contracting officer will, within 60 days, either issue a decision or notify the contractor of the date on which a decision will be issued. For claims over \$100,000, the contracting officer's final decision shall be issued within a reasonable period after the receipt of the claim. 41 USC § 605(c)(3).

4.3.4.1. Contracting officer's final decision. The contracting officer shall draft the contracting officer's final decision in accordance with FAR 33.211, *Contracting Officer's Decision*. Prior to issuing the decision, TCJA shall review the decision for legal sufficiency. The decision should include a description of the claim, a reference to the pertinent contract terms, a statement of the factual areas of agreement and disagreement, and a statement of the contracting officer's final decision with supporting rationale. The decision must also include a demand for payment, in accordance with FAR 32.604, *Exclusions*, and 32.605, *Responsibilities and Cooperation Among Government Officials*, in cases where the decision results in a finding that the contractor is indebted to the Government (affirmative Government claim). The decision must be written to inform the contractor of the facts and reasons upon which the contracting officer's conclusion is based, that the decision is final, and to provide the contractor notice of the appeal rights in accordance with FAR 33.211.

4.3.4.1.2. Payment demand, payment due date, and right to setoff. If the claim involves money that is owed to the Government by the contractor, IAW FAR 32.606, *Debt Collection*, the Government should clearly state how much is owed (including the supporting rationale), the date the payment is due, and an admonition that if the demand is not paid timely, the Government will offset future contract payments until this amount is satisfied.

4.3.4.1.3. Notification of appeal rights. The contracting officer's final decision should include the mandatory language cited in FAR 33.211.

4.3.4.2. Transmittal of the contracting officer's final decision. The contracting officer's final decision with the Findings of Fact shall be transmitted by certified or registered mail, return receipt requested, to the contractor's address shown on the initial contract page or by another reasonable method (such as email) that evidences receipt by the contractor.

4.4. Affirmative Government claims. Contract claims by the Government should also be processed under the guidelines set forth in paragraph 5.4.

4.5. Maintenance of records upon contract closeout.

4.5.1. All Government personnel must exercise care to prevent premature destruction of contract administration and finance records that are involved in claims and appeals before Boards and Federal courts. Contract files containing these records are sometimes retired or destroyed before all claims and appeals have been fully resolved. In the process of retiring records, documents that do not appear to have a permanent value are often discarded, such as handwritten memoranda and preliminary drafts. Therefore, it is important to identify such material during the investigation and to provide for its retention in accordance with paragraph 3.2. of this instruction and the DFARS 204.804, *Closeout of Contract Files*. Regardless of the action taken by the ESI Search Technician, the duty to preserve documents remains incumbent on all Government personnel.

4.5.2. To avoid closeout of an official contract file prior to completion of a pending appeal, all contract files involving an appeal shall be retained intact for seven years after the date of the final ASBCA or Federal court decision in the case. In an appeal dismissed by the ASBCA or Federal court with prejudice based on stipulation of the parties, or by request of the contractor following the settlement of the appeal, normal retention procedures will apply.

5. Procedures for handling appeals at the ASBCA.

5.1. Notice of Appeal. Normally, the contractor will send a Notice of Appeal directly to the ASBCA and will furnish a copy to the contracting officer. If the contracting officer receives the original Notice of Appeal, it should be promptly forwarded to TCJA. Specifically, TCJA must ensure that any notice of appeal received directly shall be promptly forwarded to the Chairman, Armed Services Board of Contract Appeals, 5109 Leesburg Pike, Suite 703, Falls Church, VA 22041-3208 and include the envelope showing the date stamp indicating when the notice of appeal was received by mail.

5.2. Appeal File (Rule 4).

5.2.1. General. In accordance with Rule 4 of the ASBCA, the contracting officer is responsible for assembling and transmitting to the ASBCA, within 30 days of notice of appeal, an appeal file consisting of all documents pertinent to the appeal. Normally, appeal files are assembled by the contracting officer with the support of TCJA. The appeal file shall include the compilation of

documents described in Rule 4 and shall be prepared in accordance with this section. For additional guidance on how to prepare a Rule 4 file, contact a TCJA acquisition attorney.

5.2.2. Filing Procedure.

5.2.2.1. General. The contracting officer shall forward the completed Rule 4 file directly to TCJA for review prior to submission to AFLOA, the ASBCA, or the contractor. Before the ASBCA suspense has expired, the contracting officer will also furnish the appellant a copy of each document except the contract. The letter of transmittal to the ASBCA covering the appeal file shall state that a copy of the appeal file has been forwarded to the contractor.

5.2.2.2. Minimum number of copies. Unless otherwise directed by the ASBCA, one copy of the complete appeal file shall be forwarded to the ASBCA.

5.2.2.3. Appeal file supplements. With concurrence of TCJA, the contracting officer may submit to the ASBCA, in the same manner as the original appeal file, additional material to supplement to the appeal file. The contracting officer shall simultaneously submit copies of the supplementary material to the contractor. Tab numbers in an appeal file supplement shall begin with "S."

5.2.2.4. Form. Appeal files will be assembled in three-ring binders, or as otherwise directed by the ASBCA. Each document will be separated by a divider with a tab attached. In accordance with ASBCA rules, the tabs should be numbered sequentially. The tab numbers may be preprinted, hand printed, or typed on the tab. If the appeal file is voluminous, it should be divided into two or more volumes. The cover of each volume shall identify it as the appeal file and include the appeal caption, contract number, docket number, and volume number. Additionally, an index of documents shall be placed in the front of all volumes of the appeal file. Drawings may be placed in a separate volume. Generally, drawings should be placed in the appeal file in the following or other comparable manner: (1) insert a sealed manila envelope into the assembly, punching holes at the top, or left side, so that the top, left side, and bottom are even with the remaining documents; (2) cut the right envelope side open, parallel to the right edge of the remaining documents; and (3) fold the drawings so that they can be inserted and removed from the right side of the envelope. When a complete set of specifications or drawings is furnished, it should be identified as an appendix to the appeal file which can be easily reviewed, e.g., a complete set of specifications similar to the basic appeal file; a complete set, or several drawings clearly marked, rolled, and placed in a shipping tube. Specifications and drawings need only be submitted to the ASBCA. When large documentary exhibits are included in the appeal file, such exhibits shall be paginated for easier reference.

5.3. TCJA.

5.3.1. Authority. The Staff Judge Advocate, USTRANSCOM, through AFLOA, has the authority to control the conduct of ASBCA litigation, including the form and content of submitted documents, the order and presentation of evidence, and communications with the ASBCA and opposing counsel. Controlling the conduct of ASBCA litigation does not include business decisions or other actions reserved for the contracting officer.

5.3.2. Supporting counsel. The Staff Judge Advocate, USTRANSCOM, will detail TCJA attorneys to support the Government's case in conjunction with AFLOA.

5.4. Pleadings.

5.4.1. Answer. The TCJA attorney detailed to the case shall draft and coordinate with TCAQ the Government's answer to the contractor's complaint.

5.4.2. Government complaints. In appeals of affirmative Government claims, the ASBCA may require the Government to file the complaint. A Government complaint shall conform to the Federal Rules of Civil Procedure.

5.5. Motions. The TCJA attorney detailed to the case shall draft all motions, in coordination with TCAQ and transmit the motions to AFLOA for review and filing with the ASBCA. These include: motion for an extension of time; motion to compel; motion to amend; motion to strike; and motion to suspend proceeding.

5.6. Briefs. The TCJA attorney shall coordinate with TCAQ when drafting the agency brief and send the brief to AFLOA for filing with the ASBCA.

5.7. Discovery. Discovery is covered by Rule 14 of the ASBCA and should generally follow the Federal Rules of Civil Procedure. All Government personnel are required to assist the TCJA attorney and the ESI Search Technician in discovery procedures.

5.8. ADR. USTRANSCOM personnel are encouraged to engage in ADR of contract claims and appeals to the maximum extent practicable.

5.9. Settlement. The authority and responsibility to settle contract appeals docketed with the ASBCA remain with the contracting officer. The contracting officer shall advise the TCJA attorney of all offers of settlement from a contractor when such offer is made by the contractor rather than by the contractor's attorney to TCJA.

5.10. Decisions/payment. After the ASBCA hands down a decision, unless appealed, USTRANSCOM shall make prompt payment to the appellant from available program appropriations. If program funds are not readily available or extraordinary circumstances exist, the Judgment Fund, as provided for in the Contract Disputes Act, 41 USC § 612, *Payment of Claims*, may be used.

5.11. Attorney fee claims. Pursuant to the Equal Access to Justice Act (EAJA), 5 USC § 504, *Costs and Fees of Parties*, a qualifying appellant may recover fees and other expenses incurred in connection with the appeal if it prevails either through a favorable settlement or ASBCA decision and when the Government's position was not substantially justified. As a jurisdictional matter, Equal Access to Justice Act (EAJA) requires that a ASBCA receive an appellant's application for an award of fees and other expenses within 30 days of final disposition of the matter. Upon receipt of a request for fees and expenses under EAJA, the TCJA attorney

responsible for the appeal should review the appellant's qualifications and follow the ASBCA's procedures for award of fees and expenses under EAJA.

6. Direct Actions in the United States Court of Federal Claims.

6.1. Responsibilities.

6.1.1. DOJ. DOJ is responsible for Contract Disputes Act cases in the US Court of Federal Claims. 28 USC § 518, *Conduct and Argument of Cases*.

6.1.2. The Staff Judge Advocate will assign a TCJA attorney to prepare a litigation report and to assist the DOJ attorney assigned to the case.

6.2. Settlement. Authority to settle the case is vested solely in the DOJ. 28 USC § 516, *Conduct of Litigation Reserved to Department of Justice*, and 28 USC § 519; *Supervision of Litigation*, and Exec. Order No. 6166, June 10, 1933, reprinted in 5 USC § 901, *Purpose*. Once litigation is docketed before a Federal court, the contracting officer loses all authority to settle the case. All recommendations concerning settlement of cases in the US Court of Federal Claims will be made by the AFLOA Chief Trial Attorney to DOJ. The TCJA attorney assigned to the case, in collaboration with the contracting officer, is responsible for forwarding the settlement recommendation, including an explanation of the proposed terms and the reasons why the Government should or should not agree to them, to the assigned DOJ attorney.

6.3. Decisions. In cases where the US Court of Federal Claims issues a decision sustaining the appeal, payment will be made in accordance with Judgment Fund procedures.

7. Appeals to the United States Court of Appeals for the Federal Circuit. DOJ is responsible for Contract Disputes Act cases in the US Court of Appeals for the Federal Circuit. 28 USC § 518(a). The DOJ attorney assigned to the case is responsible for representing the Government, to include preparing and filing the Government's brief and participating in oral arguments.

8. Bid Protests.

8.1. General. Contracting officers retain the inherent authority to resolve protests by taking corrective action. When the conduct of a procurement is protested, all parties should use their best efforts to resolve the matter with the contracting officer. Contracting officers may also communicate with the protester in an attempt to convince them to withdraw, but only with close TCJA coordination.

8.2. Protest to the agency.

8.2.1. General procedures. The contracting officer shall follow procedures outlined in FAR 33.103, Protests to the Agency. Where appropriate, and as permitted by law, alternative dispute resolution procedures may be used to resolve protests.

8.2.1.1. The USTRANSCOM HCA is authorized to decide all agency protests with power of delegation.

8.2.2. Protest options. A protestor has two options in filing an agency-level protest.

8.2.2.1. A protestor may submit an agency-level protest at a level to be resolved by the contracting officer.

8.2.2.2. A protestor may request an independent review of a protest at a level above the contracting officer in lieu of submitting a protest to the contracting officer or as an appeal of a contracting officer's decision on a protest. Protests requiring an independent review will be forwarded to the HCA. The HCA may appoint an independent review official for assistance in conducting this review. A protest that does not clearly request an independent review will be resolved by the contracting officer responsible for the action being protested.

8.2.3. Protest before award. Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved by the HCA.

8.2.4. Protest after award. Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with FAR Part 15.505, *Preaward Debriefing of Offerors* or FAR Part 15.506, *Postaward Debriefing of Offerors*, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved by the HCA.

8.2.5. Upon receipt of an agency-level protest either before or after award, the contracting officer will:

8.2.5.1. Immediately notify TCJA and the requiring activity.

8.2.5.2. Acknowledge receipt of the agency-level protest via letter or electronic mail to the protestor.

8.2.5.3. Review the protest to ensure it is submitted in accordance with the procedures outlined in FAR Part 33.103.

8.2.5.4. Prepare an agency-level protest decision that is well-reasoned and explains USTRANSCOM's position. Prior to issuing the decision, TCJA shall review the contracting officer's decision for legal sufficiency.

8.2.5.5. The contracting officer shall submit the agency-level protest decision memo and results of the legal review to the HCA for review.

8.2.5.6. After TCJA and the HCA review the agency-level protest decision memo, the contracting officer shall sign the agency-level protest and ensure it is forwarded to the protestor in a manner that provides evidence of receipt.

8.2.5.7. If the protestor requested an independent review of the protest, the HCA shall sign the agency protest decision and ensure it is forwarded to the protestor in a manner that provides evidence of receipt.

8.3. Protests to Government Accounting Office (GAO).

8.3.1. General Procedures. The Staff Judge Advocate, USTRANSCOM, has the authority to control the conduct of GAO bid protests, including the form and content of submitted documents, the order and presentation of evidence, and communications with GAO and opposing counsel. Controlling the conduct of GAO protests does not include business decisions or other actions reserved to the contracting officer.

8.3.2. The Staff Judge Advocate has delegated to the Chief of Acquisition Law the authority to determine the final agency legal position for GAO protests. Final agency legal positions include the agency report and agency response to protester comments, as well as any other dispositive motion submitted by the agency.

8.3.3. Each contracting officer's submitted report shall include the analysis and documentation set forth in FAR 33.104(a)(3), *General Procedures*.

8.3.4. Immediately after receipt of a complete copy of the protest, counsel assigned to the case should consider whether a request for summary dismissal is appropriate. If summary dismissal of the entire protest or certain issues of the protest is warranted, a request must be submitted to the GAO as soon as possible.

8.3.4.1. The written request should clearly indicate the protest number, the grounds of the protest that should be dismissed, and the reasons for dismissal. The request should also assert USTRANSCOM's intent to submit a full agency report within the normal deadline in the event the GAO declines to summarily dismiss the protest.

8.3.4.2. Counsel assigned to the protest should contact the GAO administrative office by telephone and/or email to inform them that a request for summary dismissal is being prepared. Subsequently, the request and supporting documents should be faxed and/or emailed to the GAO attorney assigned to the case.

8.3.5. Assigned protest attorney(s) responsible for responding to protests at the GAO must fax and/or email a written notice of appearance to the GAO, protester, intervener, if any, and AFLOA, as appropriate, not later than three days after being notified of the protest. The notice shall include the name, address, phone number, facsimile number, and e-mail address of the attorney who will represent USTRANSCOM in the protest.

8.3.6. Protests before award. The findings for authorization of contract performance should be processed in accordance with the requirements provided at FAR 33.104 (b)(1), *Protests before award*. All requests to override an automatic stay of award should be forwarded through the USTRANSCOM Staff Judge Advocate to the USTRANSCOM Head of Contracting Activity for approval to award a contract or issue a notice to proceed, notwithstanding a protest. Generally such request shall be forwarded to the Staff Judge Advocate within three days of notice of the protest. The request shall include a complete explanation for the need to award or proceed with performance of the contract, including costs and other impacts.

8.3.7. Protests after award. The findings for authorization of contract performance should be processed in accordance with the requirements provided at FAR 33.104 (c)(2), *Protests after award*.

8.3.8. Contracting officer's reports on GAO protests.

8.3.8.1. In addition to the documents described in FAR 33.104(a)(3), each contracting officer's report on a GAO protest shall include the following:

8.3.8.1.1. Contracting Officer's Statement of Relevant Facts prepared with complete documentation and including all the facts, both favorable and unfavorable, to the contracting officer's position.

8.3.8.1.2. Memorandum of Law, prepared by legal counsel with citation to pertinent decisions of the Comptroller General.

8.3.8.1.3. The Agency Report should be assembled in a secure binder fastened at the left side with a fastener that will permit the full page to be read. The index of all documents should be placed as the first page. Each document should be separated by a divider with a tab attached. The contracting officer's statement should be paginated. Sizable files should be divided into two or more volumes. The cover of the report should identify it as the protest file and include the file number. Drawings should be folded and placed into an envelope in the binder. The solicitation/contract should be enclosed as a separate exhibit if it is voluminous in size.

8.3.8.1.4. The contracting officer's report shall not be released to any member of the public, including the protestor and other interested parties, without the prior approval of GAO, and only in accordance with the terms of the protective order (if such order is in effect).

8.4. Protests to the Court of Federal Claims.

8.4.1. DOJ. The DOJ is responsible for pre- and post-award protests to the US Court of Federal Claims.

8.4.2. TCAQ and TCJA will support DOJ as necessary.

9. Bankruptcy.

9.1. Policy. FAR 42.900, *Bankruptcy, Scope of Subpart*, details what actions an Agency should take when faced with a potential or actual bankruptcy by a contractor.

9.1.2. When USTRASCOM personnel become aware of a potential or current bankruptcy issue, they shall immediately notify TCJA. USTRANSCOM personnel should then determine the amount of the USTRANSCOM claim against the contractor and take actions necessary to protect USTRANSCOM financial interests, as well as safeguard USTRANSCOM property or mission requirements.

9.1.3. IAW FAR 42.902, *Procedures*, USTRANSCOM contracting officers shall consult with legal counsel, whenever possible, prior to taking any action regarding the contractor's bankruptcy proceedings.

9.1.4. DOJ is responsible for representing USTRANSCOM before federal bankruptcy courts.

9.1.5. TCAQ and TCJA will support DOJ as necessary.

10. Non-FAR Contracts. Disputes involving tenders or other non-FAR contractual instruments may be considered by a variety of forums (USTRANSCOM, GAO, General Services Administration, Court of Federal Claims, etc.). Any dispute involving a non-FAR contract should be forwarded to TCJA for a determination of how to handle the matter.

JON L. LIGHTNER
Colonel, USA
Staff Judge Advocate

Attachment

GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION

Statutes

5 USC 504, *Costs and Fees of Parties*
 5 USC Chapter 9, *Executive Reorganization §901, Purpose*
 28 USC 516, *Conduct of Litigation Reserved to Department of Justice*
 28 USC 518, *Conduct and Argument of Cases*
 28 USC 519, *Supervision of Litigation*
 41 USC Chapter 9, *Contract Disputes, §601-613*
 41 USC 601, *Definitions*
 41 USC 602, *Applicability of Law*
 41 USC 603, *Maritime Contracts*
 41 USC 604, *Fraudulent Claims*
 41 USC 605, *Decision by Contracting Officer*
 41 USC 606, *Contractor's Right of Appeal to Board of Contract Appeals*
 41 USC 607, *Agency Board of Contract Appeals*
 41 USC 608, *Small Claims*
 41 USC 609, *Judicial Review of Board Decisions*
 41 USC 610, *Subpoena, Discovery, and Deposition*
 41 USC 611, *Interest*
 41 USC 612, *Payment of Claims*
 41 USC 613, *Separability*
 FED.R.APP.P.4(a)(1), *Federal Rules of Appellate Procedure (Appeal Period)*

Regulations

FAR 15.505, *Preaward Debriefing of Offerors*
 FAR 15.506, *Postaward Debriefing of Offerors*
 FAR 32.604, *Exclusions*
 FAR 32.605, *Responsibilities and Cooperation Among Government Officials*
 FAR 32.606, *Debt Collection*
 FAR 33.104(a)(3), *General Procedures*
 FAR 33.104(b)(1), *Protests Before Award*
 FAR 33.104(c)(2), *Protests After Award*
 FAR 33.2, *Disputes and Appeals*
 FAR 33.204, *Policy*
 FAR 33.210, *Contracting Officer's Authority*
 FAR 33.211, *Contracting Officer's Decision*
 FAR 33.214, *Alternative Dispute Resolution (ADR)*
 FAR 42.900, *Bankruptcy, Scope of Subpart*
 FAR 42.902, *Procedures*
 DFARS 204.804, *Closeout of Contract Files*
 DOD Directive 5100.3, *Support of the Headquarters of the Combatant and Subordinate Unified Commands*

Acronyms

ADR - Alternate Dispute Resolution
AFLOA - US Air Force Legal Operations Agency
ASBCA - Armed Services Board of Contract Appeals
DFARS - Defense Federal Acquisition Regulation Supplement
DOJ – Department of Justice
EAJA - Equal Access to Justice Act
ESI - Electronically-Stored Information
FAR - Federal Acquisition Regulation
FRCP - Federal Rules of Civil Procedure
GAO – Government Accounting Office
HCA - Head of Contracting Activity
TCAQ – USTRANSCOM, Acquisition
TCJA – USTRANSCOM, Office of the Staff Judge Advocate
US – United States
USC - United States Code